STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Lonnie Marzilli	:	
	:	
v.	:	**A.A. No. 12 - 225**
	:	
Department of Labor & Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore,

ORDERED, ADJUDGED AND DECREED, that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 12th day of April, 2013.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. Mr. Lonnie J. Marzilli filed the instant complaint for judicial review of a final decision of the Board of Review of the Department of Labor and Training, which held that he was not entitled to receive employment security benefits based upon proved misconduct. Jurisdiction for appeals from the decision of the Department of Employment and Training Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. Employing the standard of review applicable to administrative appeals, I find that the decision of the Board of Review is supported by substantial evidence of record and was not affected by error of law; accordingly, I recommend that it be affirmed.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Lonnie J. Marzilli was employed by Design Fabricators as a finishing supervisor for eight years. He was discharged on April 14, 2012.

On May 8, 2012 Mr. Marzilli applied for employment security benefits but on July 10, 2012 the Director issued a decision that he was disqualified from receiving benefits because he quit without good cause within the meaning of Gen. Laws 1956 § 28-44-17. See Director's Exhibit No. 2.

Claimant filed an appeal and a hearing was scheduled before Referee Nancy L. Howarth on August 9, 2012 at which the claimant and two employer representatives appeared and testified. As a result, the Director's decision was affirmed.

In her May 13, 2011 Decision, Referee Howarth found the following facts on question whether claimant was fired for misconduct:

> **2. Findings Of Fact:**
>
> The claimant was employed as a finishing supervisor by the employer. On April 13, 2012 the claimant was scheduled to begin work at 7:00 a.m. He did not report to work at that time, nor did he call the employer. The employer attempted to contact the claimant. They were unable to do so. On April 14, 2012 the claimant called the employer at approximately 11:00 a.m. to make arrangements for receiving his check. The employer discharged the claimant that day for being absent without proper notice on April 13th.

Decision of Referee, August 23, 2012 at 1. Based on these findings, the Referee pronounced the following conclusions:

> **3. Conclusion:**
> * * *
> The burden of proof in establishing misconduct rests solely with the employer. In the instant case the employer has sustained its burden. The evidence and testimony presented at the hearing establish that the claimant failed to report to work as scheduled, without notice to the employer. I find that the claimant's actions were not in the employer's best interest and, therefore, constitute misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, August 23, 2012 at 2. Accordingly, the Referee found claimant was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-18.

Thereafter, a timely appeal was filed by Mr. Marzilli and the matter was reviewed by the Board of Review. In a decision dated October 3, 2012, the members of the Board of Review unanimously held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the Board determined that claimant was disqualified from receiving unemployment benefits; the Decision of the Referee was thereby affirmed.

Mr. Marzilli filed an appeal within the Sixth Division District Court on November 2, 2012. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1.

II. APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on disqualifying circumstances; Gen. Laws 1956 § 28-44-18, provides:

> **28-44-18. Discharge for misconduct. —** An individual who has been discharged for proved misconduct connected with his or her work shall become ineligible for waiting period credit or benefits for the week in which that discharge occurred and until he or she establishes to the satisfaction of the director that he or she has, subsequent to that discharge, had at least eight (8) weeks of work, and in each of that eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in employment for one or more employers subject to chapters 42 – 44 of this title. Any individual who is required to leave his or her work pursuant to a plan, system, or program, public or private, providing for retirement, and who is otherwise eligible, shall under no circumstances be deemed to have been discharged for misconduct. If an individual is discharged and a complaint is issued by the regional office of the

> National Labor Relations board or the state labor relations board that an unfair labor practice has occurred in relation to the discharge, the individual shall be entitled to benefits if otherwise eligible. For the purposes of this section, "misconduct" is defined as deliberate conduct in willful disregard of the employer's interest, or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence. Notwithstanding any other provisions of chapters 42 – 44 of this title, this section shall be construed in a manner that is fair and reasonable to both the employer and the employed worker.

In the case of Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Rhode Island Supreme Court adopted a definition of the term, "misconduct," in which they quoted from Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941):

> 'Misconduct' * * * is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.

The employer bears the burden of proving through a preponderance of evidence that the claimant's action, in connection with his work activities, constitutes misconduct as defined by law.

The particular ground of misconduct alleged in the instant matter — absenteeism — has been held to constitute misconduct justifying disqualification from the receipt of benefits in District Court cases too numerous to cite. This has also been the view expressed

nationally. ANNOT., Discharge for absenteeism or tardiness as affecting right to unemployment compensation, 58 A.L.R.3d 674. An unexplained absence from work — what in common parlance is known as being a "no call, no show" has been held to be a particularly egregious form of lateness/absenteeism. See Blazer v. Department of Employment Security, A.A. No. 88-30 (Dist.Ct. 8/25/88)(Moore, J.); Audette v. Department of Employment and Training, A.A. No. 91-126 (Dist.Ct. 12/11/91) (DeRobbio, C.J.).

III. STANDARD OF REVIEW

The standard of review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases.**
> * * *
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly

erroneous.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[2] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[3]

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

> * * * eligibility for benefits is to be determined in the light of the expressed legislative policy that "Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family." G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

IV. ISSUE

The issue before the Court is whether the decision of the Board of Review was supported by reliable, probative, and substantial evidence in the record or whether or not it

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1 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

2 Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

3 Id.

was clearly erroneous or affected by error of law. More precisely, was claimant disqualified from receiving unemployment benefits due to misconduct as provided by section 28-44-18?

V. ANALYSIS

A. Overview.

For the following reasons I conclude that the Board of Review's decision in this case was supported by substantial evidence of record and is not clearly erroneous. As I shall explain, I arrive at this conclusion on the grounds that Mr. Marzilli was a "No call, No show" — a particularly egregious form of lateness — and that he was late on a number of occasions. I therefore recommend that the Board's decision denying benefits be affirmed.

B. Summary of Testimony.

The first witness for the employer was Mr. Keith Degraide, the shop foreman. Referee Hearing Transcript, at 6 et seq. He testified that on Friday, April 13, 2012 Mr. Marzilli failed to appear for work. Referee Hearing Transcript, at 6. He stated that while employees are supposed to call-in before the start of their shift, Mr. Marzilli failed to do so. Referee Hearing Transcript, at 6-7. In addition, Mr. Degraide tried to call him, but received no response. Referee Hearing Transcript, at 6. Mr. Marzilli was scheduled to work 7:00 A.M. to 3:30 P.M. that day. Referee Hearing Transcript, at 7.

According to Mr. Degraide, he did not hear from Mr. Marzilli until 11:00 A.M. the next day — Saturday — when he called to arrange to pick up his check. Referee Hearing Transcript, at 8-9. Later, when he came in, Mr. Degraide handed claimant his check; Mr. Marzilli then asked — "So I'm fired?" Referee Hearing Transcript, at 10. Mr. Degraide

responded "Yes, you are." Id. Mr. Degraide introduced the company policy on this point. Referee Hearing Transcript, at 13.

Mr. Degraide told Referee Howarth that Mr. Marzilli had been orally warned about lateness many times. Referee Hearing Transcript, at 14. But Mr. Degraide explained that he had been patient with Claimant Marzilli, even though he had to work around Claimant's tardiness, because it "is very difficult to replace a person in his position" and because they worked well together. Referee Hearing Transcript, at 15. He admitted that he did not follow his own policy with regard to Mr. Marzilli's lateness. Id.

Mrs. Roberta Degraide, President of the employer, also testified. Referee Hearing Transcript, at 18 et seq. She testified that she had spoken to Mr. Marzilli — whom she termed a "very valuable" employee — on several occasions about being late. Referee Hearing Transcript, at 18.

Finally, in answer to a question posed by the Referee, Mr. Degraide indicated that he was the person who fired Mr. Marzilli, based on the current incident and his repeated tardiness. Referee Hearing Transcript, at 19.

Mr. Marzilli then gave his testimony. Referee Hearing Transcript, at 21 et seq. He stated he worked for Design Fabricators from 1996 until 2000 and from March 1, 2004 until his termination. Referee Hearing Transcript, at 21. He says his vehicle broke down on Route 10. Referee Hearing Transcript, at 25. Because he did not have a cell phone with him, he went to a pay phone and called his estranged wife, and asked her to call into work for him. Referee Hearing Transcript, at 24. Claimant testified she called Rick Sousa, a fellow-employee of the Claimant's at Design Fabricators, at about 10:00 A.M., but he failed to get

back to her until after lunch. Referee Hearing Transcript, at 24. During his testimony, Mr. Marzilli admitted he was late sometimes. Referee Hearing Transcript, at 26. He indicated he had no documentary proof that his vehicle broke down or that it was towed. Referee Hearing Transcript, at 27.

The Degraides denied they received any such message through Mr. Sousa. Referee Hearing Transcript, at 25. Mr. Marzilli posited that his wife spoke to Mr. Sousa because the Degraides were in a meeting. Referee Hearing Transcript, at 28.

C. Explanation.

Whether a claimant failed to appear for work on-time or failed to call-in to report an absence are questions of fact. But, in this case, many key facts are not in dispute. Mr. Marzilli admitted he had a history of tardiness; he conceded he failed to appear for work on April 13, 2012; and, he admitted that, at best, his employer was not told of his absence until around 12:30 P.M. — five hours into the company's work day.

Appellant's position, as presented in his most learned memorandum, is that he had a valid excuse for being absent on April 13, 2012. See Appellant's Memorandum, at 2-3. He also urges this Court to view the allegation that he was a "no-call, no-show" on that particular Friday the thirteenth as being an isolated incident, separate from his history of lateness. See Appellant's Memorandum, at 3-5. But Mr. Degraide was clear in his testimony that Claimant was fired for being a no-show in the context of his history of lateness. As the employer quite correctly points out in its memorandum, Mr. Marzilli was already late for work when his truck broke down on April 13th. See Appellee's Memorandum, at 5 citing

Referee Hearing Transcript, at 26. Both tardiness and absenteeism are attendance issues[4] and, in my view, can properly be considered together. See Alexander Fraoli v. Department of Labor and Training Board of Review, A.A. No. 11-155 (Dist.Ct. 5/25/2012)(Slip op. at 9-10).

It is also proper to note that Claimant's defense — that he broke down and sent a message to his employer through his wife — was completely uncorroborated. He offered no documentary proof that he broke down, that he was towed by the Automobile Association, or that his wife called. He tendered no explanation why he did not call to confirm that the Degraides received his message. While it may have been difficult for him to present Mr. Sousa as a witness (since, presumably, he still works there), one does wonder why his wife would not have been willing to assist his efforts to collect unemployment benefits. Although she could not have proven that the Degraides received her message, she could at least have shown that, through her, Claimant attempted to notify his employer that he had broken down.

D. Resolution.

As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws § 42-35-15(g), supra at 5 and Guarino, supra at 5, fn. 1. In other words, the role of this Court is not to choose which set of testimony – the employer's or the claimant's – is more credible; instead, it is merely to determine whether the Board's decision, in light of the evidence of

[4] To be clear, I have considered attendance issues as misconduct per se and not as a violation of a work rule. As Claimant argued, Mr. Degraide conceded that the employer's

record, is clearly erroneous. Based on my review of the record, including the testimony given at the hearing before the Referee — which I have summarized — I believe it is not.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. GEN. LAWS 1956 § 42-35-15(G)(5),(6).

Accordingly, I recommend that the decision of the Board be AFFIRMED.

_____/s/_____
Joseph P. Ippolito
MAGISTRATE

APRIL 12, 2013

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work rule was not uniformly enforced. See Appellant's Memorandum, at 5-6.